SUPREME COURT, U. S.

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Supreme Court Of The United States

OCTOBER TERM, 1973

NO. 73-1713

ROBERT LEE SMYZER, SR., PETITIONER

versus

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of Certiorari entered on October 15, 1974 and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

The Refusal by the Bailiff to Give the Jury Requested Evidentiary Material on the Erroneous Grounds That Such Material was not in Evidence Deprived the Petitioner of the Right to an Impartial Jury

The right to a fair and impartial jury is guaranteed to the Petitioner by the Sixth and Fourteenth Amendments. This right encompasses a jury verdict based only upon evidence that has been presented in the

course of the trial. A verdict that even possibly rests on material not entered into evidence has been held improper. *Turner* v. *Louisiana*, 379 U.S. 466 (1965). The Court has thus been very cautious in keeping the grounds for verdicts restricted to the record. The problem presented in this case is that the Petitioner was not allowed to have evidence entered on his behalf presented to the jury upon their request during deliberation of their verdict. To forbid the jury to view evidence which has been properly admitted during the trial is just as prejudicial as allowing jury verdicts based on material not admitted into evidence at all.

The Petitioner was tried for the murder of one Arthur Sands. During the course of that trial the Petitioner asserted that he was acting in self-defense. The issue of the decedent's reputation for peacefulness and quietude was of paramount importance to this plea. An affidavit from an absent witness describing the violent nature of the decedent was introduced by counsel for the Petitioner. This affidavit was duly admitted into evidence by reading it to the jury in open court. The only other evidence Petitioner relied upon to support this plea was his own testimony that at the time of the incident he thought the decedent was reaching for a knife. The jury returned a verdict of guilty after a two day trial on February 27, 1973.

A juror subsequently related to counsel for the Petitioner that the jury, during the course of its deliberation, had requested this affidavit but the bailiff refused to allow them to see it on the ground that it was not in evidence. It was unclear whether the bailiff was repeating the judge's rationale or his own in stating this

particular reason for the denial. In either situation, the jury was not allowed to view the one piece of evidence supportive of the Petitioner's testimony. Moreover, they were told that the material could not be produced because it was not in evidence at all, which was not true. In this regard, the case of *Parker* v. *Gladden*, 385 U.S. 363 (1966) is especially relevant.

In *Parker*, the bailiff remarked to at least two jurors in a murder trial his opinion that the defendant was guilty. He also stated to these jurors that even if the defendant was not guilty that could be corrected on appeal. The Court held this to be reversible error because the jury was allowed to consider material which was not in evidence. The Court so ruled despite the fact that, at most, only three jurors heard the bailiff's remarks. The "official character" of the bailiff was held to "possess great weight" with the jury. The Court also noted that the jury deliberated for some 26 hours before reaching a verdict and that one juror had testified that she was indeed prejudiced by the statements. Even without such facts, it is clear that the Court would have ruled in the same manner.

> "Aside from this, we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process' ". 385 U.S. at p. 365.

In this case, the jury requested evidentiary matters from the bailiff. There is no spontaneous situation here such as existed in the *Parker* case: the jury asked the bailiff for a specific piece of evidence, and his response was directed only to that request. Due to his official character, the jury quite naturally accepted the ex-

planation tendered by the bailiff to the effect that such materials were not in evidence. They had thus been told. in effect, to further disregard any conclusions possibility derived from that affidavit. Surely, the jury being told that certain matters were no longer in evidence is as prejudicial as their considering matters not validly admitted into evidence at all.

The request for the affidavit was reflective of the entire jury's desire to further examine it. Thus, the bailiff's refusal was obviously communicated to all the jurors, not just two as in the *Parker* case. The entire jury was informed that this affidavit was not in evidence and therefore could not be produced for their inspection. Unlike the remarks in the *Parker* case which dealt with the bailiff's *own* impressions and opinions, the bailiff's remarks here were specifically directed to a comment on evidentiary matters presented during the trial. He clearly conveyed to the jury that as a matter of law such materials were not in evidence. Moreoever, at least one juror stated to Petitioner's counsel that if such evidence had been presented to the jury, he would very probably have held out for not guilty. As was stated in the *Parker* case, "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." 385 U.S. at p. 366.

In conclusion, the Petitioner was entitled to a fair and impartial jury at his trial. Such a jury could only be so if their verdict was based only on matters that were presented during the trial itself. The refusal of the bailiff to produce upon the jury's request a crucial piece of evidence in Petitioner's favor denied the Petitioner the right to have the jury consider all the evidence existing

in the case. Since the reasons for the denial of the request were obviously incorrect, the jury was thus led to believe that this evidence was not relevant at all since it wasn't entered. The jury could not have been impartial for they weren't allowed to view favorable evidence for the Petitioner any further thereby creating a bias in favor of the Respondent's argument. The official character of the bailiff in his relation to the jury was such that prejudice to the Petitioner was inherent in the facts here presented.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.